Syarikat Sesco Bhd (formerly known as Sarawak Electricity Supply Corp (SESCO)) v Yu Thian Motor Services Sdn Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO KCH-12B-16/4 OF 2012
RHODZARIAH BUJANG J
10 OCTOBER 2012

Public Utilities — Supply of electricity — Claim for arrears of electricity consumption — Plaintiff's claim based on General Terms and Conditions of Electricity Supply ('the GTC') — Whether GTC had been brought to attention of defendant's representative — Whether electricity meter on defendant's premises had been tampered with — Whether inspection of meter had to be conducted by gazetted inspectors — Whether plaintiff's claim for arrears of electricity consumption would only be allowed with conviction for meter tampering — Whether contract for electricity supply was inadmissible because it was unstamped — Electricity Ordinance s 33A

The plaintiff was at material times the sole electricity provider for the whole of Sarawak. On 28 April 2010, two of the plaintiff's employees, who had conducted a routine inspection of the electricity meter at the defendant's premises, had discovered that the installation of the electricity meter (the old meter) on the defendant's premises had been tampered with and as a result the meter had failed to record the actual usage of electricity at the defendant's premises. The old meter was subsequently replaced with a new one that showed a higher electricity consumption (the new metre). Based on their calculations of what should be the actual usage for the past three years, the plaintiff company found the defendant company was in arrears. The plaintiff filed an action for the arrears of RM34,461.20 in the sessions court. The sessions court judge ('SCJ') found that the General Terms and Conditions of Electricity Supply ('the GTC'), upon which the plaintiff's claim was based, had not been brought to the attention of the defendant's representative in that the GTC was not explained to him in Mandarin when he signed the contract for the electricity supply. The plaintiff's claim was thus dismissed by the SCJ. This was the plaintiff's appeal against that decision.

Held, allowing the appeal with costs of RM10,000:

(1) Although the plaintiff as the sole provider of electricity in the state of Sarawak had a monopolistic control over consumers like the defendant and thus owed a duty to the defendant to ensure that it fully understood the GTC before it signed the contract for the electricity supply, it was a self-folly for the defendant's representative to sign on a document that he

did not understand. The defendant could not rely on the plea of *non est factum* when he was negligent when he signed it. Simply signing without understanding a document's content was a form of negligence (see paras 6–7).

(2) There was nothing unjust or unfair about cl 8 of the GTC, which provides that it was the defendant or consumer's responsibility if the meter on the defendant's premises was tampered with. Further, under cl 8 of the GTC, even if a third party tampered with the meter, the defendant would be held accountable unless it could prove that it was not done at its behest. In the circumstances, feigning ignorance was not enough to defeat the plaintiff's claim (see para 8).

(3) The SCJ had erred when he invoked an adverse inference against the plaintiff for not calling the plaintiff's employee, who had retested the defendant's old meter. The evidence of this employee was merely a reconfirmation of the testing done by two of the plaintiff's employees, who had conducted the routine inspection. Further, the plaintiff's evidence on the slowing of the old meter by 61.89% and the high consumption of electricity after the installation of the new meter was never challenged. As such, this part of the evidence, which formed a crucial part of the plaintiff's case, was accepted and binding against the defendant (see para 9).

(4) The Electricity Ordinance ('the Ordinance') did not provide that only gazetted inspectors could conduct inspections of meters installed. The inspection could be done by any authorised persons from the plaintiff corporation. Hence, it was reasonable to infer that the plaintiff's two employees, who conducted the inspection and removal of the defendant's old meter, were authorised to perform the task (see para 10).

(5) A plain reading of s 33A(1) of the Ordinance clearly showed that whether prosecution for meter tampering was instituted or not, the loss of revenue was still payable (see para 15).

(6) The defendant's objection that the contract for the electricity was inadmissible because it was unstamped was raised too late, ie only in this appeal and not before the SCJ. Given the delay there was no adjudication in this issue at this appeal. In any case, this objection would have no bearing on the final outcome of this appeal, since the contract could still be admitted upon payment of the prescribed fee and penalty under s 52(1) of the Stamp Act 1949 (see para 16).

[Bahasa Malaysia summary

Plaintif pada semua masa material merupakan satu-satunya pembekal elektrik kepada seluruh Sarawak. Pada 28 April 2010, dua daripada pekerja-pekerja plaintif yang menjalankan pemeriksaan rutin meter elektrik di premis-premis

defendan telah mendapati bahawa pemasangan meter elektrik (meter lama) pada premis-premis defendan telah dirosakkan dan akibatnya meter tersebut gagal untuk merekodkan penggunaan sebenar elektrik di premis-premis defendan. Meter lama tersebut kemudiannya ditukar dengan meter baru yang menunjukkan penggunaan elektrik yang tinggi (meter baru). Berdasarkan pengiraan mereka mengenai apa yang sepatutnya menjadi kegunaan sebenar untuk tiga tahun lepas, syarikat plaintif mendapati bahawa syarikat defendan mempunyai tunggakan. Plaintif memfailkan satu tindakan untuk tunggakan sebanyak RM34,461.20 di mahkamah sesyen. Hakim mahkamah sesyen (HMS) mendapati bahawa Terma-Terma Am dan Syarat-Syarat Bekalan Elektrik ('TAS'), di mana tuntutan plaintif diasaskan, tidak dibawa kepada perhatian wakil defendan iaitu; TAS tidak diterangkan kepadanya dalam Mandarin apabila dia menandatangani kontrak untuk bekalan elektrik. Oleh itu, tuntutan plaintif ditolak oleh HMS. Ini merupakan rayuan plaintif terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan dengan kos RM10,000:

(1) Walaupun plaintif sebagai satu-satunya pembekal elektrik di negeri Sarawak mempunyai kawalan monopoli terhadap pengguna-pengguna seperti defendan dan oleh itu mempunyai kewajipan kepada defendan untuk memastikan bahawa defendan faham sepenuhnya TAS sebelum defendan menandatangani kontrak untuk bekalan elektrik, adalah disebabkan kebodohan sendiri wakil defendan menandatangani dokumen yang tidak difahaminya. Defendan tidak boleh bergantung kepada rayuan *non est factum* apabila dia cuai ketika dia menandatanganinya. Menandatangan dengan mudah tanpa memahami isi kandungan dokumen merupakan satu bentuk kecuaian (lihat perenggan 6–7).

(2) Tiada apa yang tidak adil mengenai klausa 8 TAS yang memperuntukkan bahawa defendan atau pengguna bertanggungjawab sekiranya meter pada premis-premis defendan dirosakkan. Seterusnya, di bawah klausa 8 TAS, meskipun pihak ketiga merosakkan meter, defendan akan dianggap bertanggungjawab melainkan defendan dapat membuktikan bahawa perbuatan tersebut tidak dilakukan atas permintaannya. Dalam keadaan tersebut, berpura-pura tidak tahu tidak mencukupi untuk mematahkan tuntutan plaintif (lihat perenggan 8).

(3) HMS terkhilaf apabila beliau menggunakan anggapan bertentangan terhadap plaintif kerana tidak memanggil pekerja plaintif yang telah menguji semula meter lama defendan. Keterangan pekerja ini hanya merupakan pengesahan semula ujian yang dilakukan oleh dua daripada pekerja-pekerja plaintif yang menjalankan pemeriksaan rutin. Seterusnya, keterangan plaintif mengenai melambatkan meter lama sebanyak 61.89% dan penggunaan tinggi elektrik selepas pemasangan

meter baru tidak pernah dicabar. Oleh itu, bahagian keterangan ini yang membentuk bahagian penting kes plaintif, diterima dan mengikat terhadap defendan (lihat perenggan 9).

(4) Ordinan Elektrik ('Ordinan') tidak memperuntukkan bahawa hanya pemeriksa-pemeriksa yang diwartakan boleh melakukan pemeriksaan pada meter-meter yang dipasang. Pemeriksaan boleh dilakukan oleh mana-mana orang yang dibenarkan daripada perbadanan plaintif. Oleh itu, adalah munasabah untuk mengandaikan bahawa dua pekerja plaintif yang menjalankan pemeriksaan dan menanggalkan meter lama defendan telah dibenarkan untuk melakukan tugas tersebut (lihat perenggan 10).

(5) Bacaan jelas s 33A(1) Ordinan secara nyata menunjukkan bahawa sama ada pendakwaan untuk merosakkan meter dimulakan atau tidak, kehilangan hasil masih perlu dibayar (lihat perenggan 15).

(6) Bantahan defendan bahawa kontrak untuk elektrik tidak boleh diterima kerana kontrak tersebut tidak disetem ditimbulkan terlalu lambat, iaitu hanya pada rayuan ini dan bukannya di hadapan HMS. Disebabkan kelewatan tersebut, tiada adjudikasi mengenai isu ini dalam rayuan ini. Dalam mana-mana kes, bantahan ini tidak akan mempunyai hala tuju pada keputusan akhir rayuan ini memandangkan kontrak tersebut masih boleh diterima selepas membayar yuran yang dikenakan dan penalti di bawah s 52(1) Akta Setem 1949 (lihat perenggan 16).]

Cases referred to

Daniel Chung Ah Brooke v Samuel Chung Khong Nee and two others (Suit No 22–210 of 2010–III) (refd)

Goh Jong Cheng v MB Melwani Pte Ltd [1991] 1 MLJ 482, HC (refd)

Munusamy v PP [1987] 1 MLJ 492; [1987] 1 CLJ 250, SC (refd)

Saad Marwi v Chan Hwan Hua & Anor [2001] 3 CLJ 98, CA (refd)

Subramanian v Retnam [1966] 1 MLJ 172 (refd)

Tenaga National Bhd v JCY HDD Technology Sdn Bhd [2012] 3 MLJ 705; [2012] 3 AMR 576, HC (distd)

Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Electricity Supply Act 1990 s 38(3)

Electricity Ordinance ss 3, 3(2), 8, 8(1)(a)(i), (1)(c), (2), 33A(1)

Stamp Act 1949 s 52(1)

Tony Ling Lee Tom (HC Lee & Partners) for the appellant.
Lim Heng Choo (Lim & Lim Advocates) for the respondent.

Rhodzariah Bujang J:

[1] The plaintiff company is the sole electricity provider for the whole of Sarawak. Of late, as can be seen from the stories highlighted in the newspapers, the plaintiff has been actively pursuing errant consumers who have cheated over the usage or consumption of their electricity by tampering with the electricity meters installed at their premises. The defendant company is alleged to be one of such defrauders. An inspection carried out by two of the plaintiff's employees on 28 April 2010 discovered that the meter installed at the pillar of the gate to the defendant's premises revealed that the meter grip lock seal have been disturbed and tampered with and the meter box seal missing. It was found to show a slow reading by about 61%. Scratch marks were also seen on the seal and an indicator on the meter showed 'diagnosis 12'. These proved, contended the plaintiff, that it was indeed tampered with. The meter was subsequently replaced with a new one. The defendant's electricity consumption after the installation of the new meter showed a higher reading by the same percentage.

[2] The plaintiff's employee named Thomas Lumpu re-tested the old meter and confirmed that it was slow by at least 61%. Based on their calculations of what should be the actual usage for the past three years, the plaintiff company found the defendant company was in arrears of RM38,957.22, inclusive of the cost of the new meter and administrative cost but they claimed for a lesser amount in the sessions court, which was RM34,461.20. After a full trial, their claim was dismissed by the learned sessions court judge and their appeal is now before me.

REASONS FOR THE DISMISSAL

[3] The main reason advanced by the learned sessions court judge in his grounds of judgment is that the plaintiff's general terms and conditions of electricity supply ('the standard terms and conditions') upon which the claim is based has not been brought to the attention of the defendant's witness, Mr Chew Siong Thiam ('DW1') in that the same was never explained to him in Mandarin.

[4] The relevant clauses of the general terms and conditions relied upon by the plaintiff as pleaded in the statement of claim are, inter alia, as follows:

> (c) Where a meter has been found not to register actual consumption caused by the failure of the fuses or open circuiting of current transformers connection or other causes, the plaintiff reserves the right to recover the arrears up to a period of six years. (Clause 7 (b))

(d) On completion of each connection and the meters and cut-out sealed, the defendant shall be held responsible if the meter, seal or cut-out is removed or tempered with. (Clause 8)

(e) Any authorized representative of the plaintiff shall have the right to enter any Defendant's land, premises or building at all reasonable hours for the purposes of examining and inspecting instruments installations and equipment in order to ascertain whether there is or has been any contravention of the Electricity Ordinance or its subsequent amendments of the terms and conditions of the contract. (Clause 9)

(f) The defendant will be held responsible by the plaintiff for the safe keeping of all meters and other equipment belonging to the plaintiff placed on the premises. Should any damage or injury be caused thereto by fire, water, accident or any other causes for which the plaintiff is not responsible, the defendant shall pay to the plaintiff on demand the cost of making good any such damage or injury. (Clause 10)

[5] At the trial, evidence was shown that the standard terms and conditions were produced in two copies. The first copy, tendered as exh P2 was in the plaintiff's bundle of documents dated 6 January 2012 and the second copy, in the plaintiff supplementary bundle of documents dated 12 January 2012. The first copy was without any markings but the second was initialed according to the appellant's fourth witness, PW4 on every page by the respondent's representative Mr Chew Siang Thiam (DW1). PW4 was the counter staff who attended to DW1 when the contract for the electricity supply (exh P1 at the trial) was signed. There was no dispute that he had initialed on the standard terms of conditions which is exh P13 but only that the same were not explained to him in Mandarin, though the evidence of PW4 is that he understood English because they spoke in English. She had, she testified told him to sign on it if he agreed to the terms and conditions.

[6] The argument of the defendant is that the plaintiff being the sole provider of electricity in the state of Sarawak has a monopolistic control which gives the consumers like the defendant absolutely no choice but to sign the contract and agreed to the terms and conditions imposed on them. Therefore, submitted their counsel, Mr Lim Heng Choo, the plaintiff owed a duty to the defendant to ensure that they fully understood the terms and conditions before they signed the contract for the supply of the electricity. That, I agree with him, should be the case though I believe that there is a corresponding duty on the part of the consumer to not simply sign without understanding what he is signing. It is his right to insist on a translation when it is required and if the same is unreasonably withheld, then I would totally agree that such arrogance would militate against the one who is in the position of dominance over the other. In that situation, the English doctrine of inequality of bargaining power advocated for use in Malaysia in *Saad Marwi v Chan Hwan Hua & Anor* [2001]

3 CLJ 98 could then be applied. The Court of Appeal in the said case as cited by Mr Lim Heng Choo, further advised that the courts should 'strived to protect those incapable of protecting themselves, not against their own folly, but against those who would take advantage of them by being in a superior bargaining position'.

[7] Whilst I noted the advice given, I also think that it is a self folly to sign on a document that one does not understand and I have earlier made clear my view that it is the defendant's own fault if DW1 simply initialed on the standard terms and conditions without understanding them. Also on this issue I would refer to the case of *Subramanian v Retnam* [1966] 1 MLJ 172 where it was held that even though the defendant was ignorant of the English language, he would still be bound by the written contract entered into by him in the absence of fraud or misrepresentation. Further, as is stated in *Goh Jong Cheng v MB Melwani Pte Ltd* [1991] 1 MLJ 482, before the plea of *non-est factum* can be successfully raised, two factors must be present. First, if the document signed was significantly different from that which the signer believed it to be and two, the signer must not be negligent when he signed it. Simply signing without understanding a document's content is, in my view a form of negligence. Additionally, I do not think that the admission of the plaintiff's witness, PW1 that there was no acknowledgement of the receipt of the contract and the standard terms and conditions, would materially affect my final view that the standard terms and conditions is part of the contract for the supply of the electricity. The documents are not goods which are sold and delivered and must be shown to have been received. I am therefore of the respectful view that the learned sessions court judge has wrongly evaluated the evidence before him on this issue.

METER TAMPERING

[8] Clause 8 of the standard terms and conditions of contract as reproduced earlier provides that it is the consumers' responsibility if 'the meter, seal or cut-out is removed or tampered with' and the supply of electricity will be disconnected when this happens. The learned sessions court judge held that this clause is unfair and that there is no evidence that it was the defendant who tampered with the meter. However, the fallacy of that finding, as Mr Tony Ling for the plaintiff has submitted, is that the meter being installed in the defendant's premises, they are in the position to ensure that it is in good working order and not tampered with. This I must add is consonant with the principle of occupier's liability and as an occupier of the premise, the defendant should be responsible for the matters arising in his domain. There is therefore nothing unjust or unfair about that clause. Further, the said cl 8 does not say that it must be the defendant who tampered with the meter. Even if a third party does it, as the occupier and licensee the defendant must be held

accountable unless the defendant can prove that it was not done at their behest. Feigning ignorance of it is, in my considered view, simply not enough to defeat the plaintiff's claim.

[9] In this regard, and as mentioned earlier but I would still stressed, evidence has been led from PW2 who examined the meter and seen the indicator showing a 'diagnosis 12' as proof that the meter has indeed been tampered with so as to slow its reading and the evidence of consumption of electricity by the defendant after a new meter has been installed proves as well that the consumption of electricity was markedly high by 61% from the previous reading. It is therefore not just the scratch on the seal as highlighted by the learned sessions court judge which proves that the meter has been meddled with. The scratch line is only an indication that the seal was opened and that it was missing. Further in my view and with respect, he has erred when he invoked an adverse inference against the plaintiff for not calling one Thomas Lumpu who conducted the re-testing because his evidence is merely a re-confirmation of the testing done by PW2. An adverse inference is only to be drawn when evidence has been withheld or suppressed as decided by the Supreme Court in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] 1 CLJ 250 which definitely is not the case here. Additionally, as the notes of proceeding show, PW2's evidence on the slowing of the meter by 61.89%, to be precise, was never challenged in cross-examination, nor the high consumption after the installation of the new meter. This being a crucial part of the plaintiff's case, the failure to do so means the evidence is accepted and binding against the defendant as stated in *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212.

UNAUTHORISED PERSONNEL

[10] Mr Lim Heng Choo has submitted and the learned sessions court judge agreed with him that the inspection and removal of the original meter by PW2 and her colleague, PW3 was illegal because these two persons were not, as they both admitted in their cross-examination, gazetted as inspectors under s 3(2) of the Electricity Ordinance. However, cl 9 of the standard terms and conditions clearly provides that any authorised representative of the plaintiff can conduct the inspection and by virtue of PW2's and PW3's positions in the plaintiff corporation, ie engineering assistant and technician, respectively, it is reasonable to infer that they were authorised to perform the task as they testified in court.

[11] Mr Lim Heng Choo also raised the point that since the demand letter for the arrears (at p 55 of the appeal record (part C)) is based on s 33A of the Ordinance, PW2 and PW3 must be gazetted under s 3(2) of the Ordinance before they can recover the arrears. I do not agree that the position is so given the express condition given under cl 9 as discussed earlier. The statutory right

to collect the arrears (or loss of revenue as it is described in s 33A) is clearly independent of the powers and duties of the inspectors appointed under s 3 for the reason that when I examined the Ordinance, I do not see any provision which provides that only the gazetted inspectors can conduct inspection of meters installed. Section 8 of the said Ordinance which provides for periodical inspection of installation is silent as who should, under sub-s (2), conduct the inspection as it merely provides as follows:

> S.8(2) In addition to periodical inspections during construction and final inspections on completion, all installations, while in operation, shall be subject to such periodical inspections as may be prescribed.

[12] It follows therefore that cl 9 is applicable to allow inspection by authorised personnel of the plaintiff; not just the gazetted inspectors. This intention I gleaned from the fact that unlike s 8(2), in s 8(1)(c) it is expressly mentioned that only the chief electrical inspector or any inspector or any person authorised by him in writing can inspect the works and installation specifically mentioned therein and that too after notice has been given under s 8(1)(a)(i). Thus, in my view, when the inspectors are not specifically mentioned in the provisions, the inspection can be done by other authorised persons from the plaintiff corporation.

A CONVICTION OF METER TAMPERING

[13] Mr Lim Heng Choo submitted, based on the recently reported case of *Tenaga National Bhd v JCY HDD Technology Sdn Bhd* [2012] 3 MLJ 705; [2012] 3 AMR 576 that the plaintiff's civil claim for arrears of electricity consumption cannot be allowed without a conviction for meter tampering. I am afraid that the cited case has no application to the facts of this case for the reason that the relevant provision of the Electricity Act relied upon by Varghese George Varughese J in the said case is materially different from our Ordinance on the same matter.

[14] Section 38(3) of the Electricity Supply Act provides:

> (3) The licensee may require the consumer to pay him for the loss of revenue *due to the offence* committed under section 37(1), 37(3) and 37(14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply. (Emphasis added.)

Whilst our s 33A(1) of the Ordinance provides as follows:

> (1) Where a licensee is satisfied that —
>
> (a) any meter installed for the purposes of section 4E(1) has been tampered with or damaged to prevent it from accurately recording the quantity of electricity supplied to the consumer; or

A (b) any supply line or apparatus or system had been tampered with or altered or adjusted or operated in such a manner as to dishonestly abstract or divert energy,

then *without prejudice to any prosecution that may be instituted against him for an offence under this Ordinance,* the consumer shall be liable to pay to the licensee loss B of revenue suffered by the licensee in consequence of it. That loss of revenue shall be assessed by the licensee. (Emphasis added.)

[15] It is plain from my reading of the two sections that the recovery of the C loss revenue in the Act is dependent on the conviction whereas in the Ordinance, the words as I underlined above clearly shows that whether prosecution for meter tampering is instituted or not, the loss of revenue is still payable.

D UNSTAMPED CONTRACT

[16] Mr Lim Heng Choo submitted that since the contract for the electricity was unstamped it is inadmissible. I have in the case of *Daniel Chung Ah Brooke v Samuel Chung Khong Nee and two others* (Suit No 22–210 of 2010–III) E opined that the legal position is not automatically so, in that the unstamped document can still be admitted on payment of the prescribed fee or penalty under s 52(1) of the Stamp Act. However in this case, this objection is raised too late in the proceeding ie only in this appeal — not before the learned sessions court judge at the conclusion of the trial, nor when the contract was F tendered as evidence though, to be fair, it was raised in PW1's cross-examination. Given the delay, I do not therefore think it is open for me to adjudicate on the issue at this appeal. If I were wrong to say so, the document is still admissible but the plaintiff must pay the penalty as well as the prescribed fee under the Act for it and that is all. The issue raised will not have a bearing G on the final outcome of this appeal which is that it is allowed with cost of RM10,000 here and below.

Appeal allowed with costs of RM10,000.

H Reported by Kohila Nesan

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